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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 6, 7 and 8.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONT-NOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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THE BALLOU PRESS NEW YORK

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Supreme Court of the United States

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic, Petitioners, against UNITED STATES on the Relation of B. COLES NEIDECKER, Respondent.	October Term, 1936. Nos. 6, 7 and 8.
The Same, Petitioners, against UNITED STATES on the Relation of GEORGE W. NEIDECKER, Respondent.	
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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court is unreported, and appears at R. 12; that of the Circuit Court of Appeals is re-

ported in 81 F. (2d) 32, and appears at R. 31. This Court granted certiorari on April 13, 1936, 298 U. S., 80 L. Ed. 674.

Jurisdiction.

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on January 20, 1936, and appear at R. 49-51. Jurisdiction of this Court is invoked under Section 240a of the Judicial Code (U. S. Code, Title 28, Sec. 347) and U. S. Code, Title 28, Sec. 463c.

Nature of the Case.

These are three writs of habeas corpus sued out by the respondents (relators below) to prevent their extradition to France as fugitives from justice under the Franco-American Extradition Treaty of 1909 (37 Stat. 1526; Malloy's Treaties, Vol. 3, p. 2580). The three writs were sued out at the same time and present a single question of law. All three cases were heard and decided together in the District Court, and on appeal were consolidated by order of the Circuit Court of Appeals (R. 27) and heard and decided upon one printed record.

The three respondents are brothers, native-born citizens of the United States, who formerly operated in Paris an institution known as the Travelers Bank. The Bank closed its doors, and the respondents fled to the United States. Warrants for their arrest were issued by the proper authorities in France. Upon the arrival of the respondents in this country, they were taken into custody by the Police Department of New York City upon a preliminary warrant (R. 9) issued by a United States Commissioner upon the sworn application (R. 6-9) of the Acting Consul General of France, pursuant to Rev. Stats. 5270 (U. S. Code, Title 18, Sec. 651) and Article IV of the Franco-American Extradition Treaty *(supra)*. The Commissioner's warrant, and the application upon which it is based, charged the respondents with larceny

and other crimes, all of which are among the list of extraditable offenses as specified in Article II of the Treaty.

Immediately upon being taken into custody, before the warrant could be returned to the Commissioner, and before any extradition hearings could be held by him, the respondents sued out writs of habeas corpus (R. 2-5). These writs challenged the jurisdiction of the Commissioner upon the ground that *the respondents, by reason solely of their American citizenship, were altogether exempt as a matter of law from extradition under the Treaty, and could not be arrested or held for extradition under any circumstances, no matter what the offense.* The correctness of this contention is the sole question here involved.

The respondents to the writs of habeas corpus were the Police Commissioner of New York City and one of his subordinates. The acting French Consul General was admitted as an intervening party respondent by order of the District Court (not printed in the Record on Appeal). His successor in office, the present Consul General, was substituted by order of the Circuit Court of Appeals (R. 29).

Upon the return of the writs, the American citizenship of the respondents was conceded, and the question of law arising therefrom was argued. The District Court (Hayes, J.) after hearing argument and receiving briefs, handed down an oral opinion (R. 12) sustaining the position of the French Government and directing the dismissal of the writs.

Pursuant to this opinion, orders were entered (R. 20-21) dismissing the writs and remanding the respondents for extradition hearings. They appealed; and the Circuit Court of Appeals, by a two-to-one decision (Manton, J. dissenting), reversed the District Court, sustained the claim of the respondents to exemption from extradition as a matter of law, upon the ground of their American citizenship, and directed their discharge. The majority opinion of the Circuit Court of Appeals is found at R. 31, the dissenting opinion at R. 37, and the judgments at R. 49-51.

Certiorari was granted upon a petition which set forth:

(a) That an important question of Federal law was presented, which had never been decided by this Court,

(b) That the question was of wide application, involving not only the interpretation of the Franco-American Extradition Treaty, but also the interpretation of some thirty-two other treaties containing identical language,

(c) That there was a conflict of authority between the decision of the Circuit Court of Appeals (the only appellate tribunal in this country which has passed upon the question) and other decisions,—particularly those of the English courts.

The Question Presented.

Article I of the Treaty provides that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other." (Italics ours throughout this brief.)

The word "*persons*" has been held by this Court to include citizens of the asylum state, as well as all others. *Charlton* v. *Kelly*, 229 U. S. 447.

Article V of the Treaty, however, goes on to provide:

> "Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention."

We contended below, and the District Court and the dissenting Judge in the Circuit Court of Appeals held, following two decisions of the Queen's Bench Division in England, that this language does not operate to give American citizens an absolute exemption from extradition as a matter of law, but merely renders such extradition discretionary with the Execu-

tive,—subject, of course, to a prior judicial hearing and a finding of probable cause of guilt by the magistrate, as in all extradition cases.

The respondents, on the other hand, contend, and the majority of the Circuit Court of Appeals held, that the phrase "neither party *shall be bound*", must be construed as equivalent to "neither party *shall be permitted*", and that there is consequently no authority or power in either the Judiciary or the Executive to extradite American citizens to France for any crime whatever.*

Summary of Argument.

I. The American citizenship of the respondents does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive, after other requirements (arrest, hearing before a magistrate, proof of guilt, etc.) have been met. (*Infra*, pp. 6-14).

II. The construction for which respondents contend is repugnant to justice and contrary to accepted principles governing the interpretation of treaties. (*Infra*, pp. 14-16).

III. Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend. On the contrary, the reasonable interpretation, borne out by contemporaneous legislative history, on the French side at least, shows that it was the intention to render extradition discretionary, rather than to exclude it altogether. (*Infra*, pp. 16-22).

IV. The claim of "practical construction" of the Treaty in favor of the respondents is unfounded. (*Infra*, pp. 22-32).

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*The present case is discussed, and the opinion of the majority of the Circuit Court of Appeals adversely criticized, in 49 Harvard Law Review 1003 (April, 1936) and 30 American Journal of International Law 480 (July, 1936).

V. The Franco-American Treaty, and other treaties containing similar language, have regularly been interpreted by textwriters as conferring a discretion on the Executive. (*Infra,* pp. 33-35).

VI. A comparison of the discretionary language of Article II of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument. (*Infra,* pp. 35-37. See also classification of treaties in Appendix A, p. 40).

VII. There is no distinction between the case at bar and the decision of the Queen's Bench Division in *In re Galwey,* [1896], 1 Q. B. 230. The reasoning of that decision is sound, and should be followed. (*Infra,* pp. 37-39).

ARGUMENT.

I. The American citizenship of the respondents does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive.

Article I of the Treaty contains the mutual agreement of the parties to *"deliver up persons"* who are fugitives from justice and stand charged with specified crimes. In *Charlton* v. *Kelly,* 229 U. S. 447 is was argued that the word "persons" must be construed to mean "persons other than citizens of the asylum state." This construction had in fact been uniformly adopted by the foreign government there involved (Italy), which had always refused to surrender its citizens to the United States. This Court, however, unanimously rejected the argument, and held, notwithstanding the lack of reciprocity thus created, that American citizens were liable to be surrendered to Italy.

The authority to extradite is completed by the enabling statute (Rev. Stats. 5270, U. S. Code, Title 18, Sec. 651) which provides the machinery for provisional arrest, hearing before a magistrate, commitment by the magistrate, and surrender by the State Department to the representative of the demanding government. This statute by its terms comes into operation

> "whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government * * *"
>
> and when complaint is made under oath
>
> "* * * charging *any person* found within the limits of any State, District or Territory, with having committed within the jurisdiction of any foreign government any of the crimes provided for by such treaty or convention."

So far it is clear that there is no difference in status between American citizens and others; and such was the holding of this Court in *Charlton* v. *Kelly, supra.*

But the respondents contend that as to their persons the entire application of both Treaty and Statute is nullified by the provisions of Article V, the English and French texts of which are as follows:

"ARTICLE V.	ARTICLE V.
Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention.	Les Parties contractantes *ne seront pas obligées* de livrer leurs propres citoyens ou sujets, en vertu des stipulations du présent traité."

The question is whether this Article, when it says that neither party *"shall be bound"* to extradite its own citizens, means that neither party shall be *permitted* under any circumstances to do so, or whether it means that each party may extradite its own citizens in what it deems to be a proper case, although it is not unqualifiedly bound to do so, so that a failure to extradite cannot be regarded as a breach of the

Treaty in any case involving a citizen. Our contention is simply that in the case at bar ample authority for extradition is given by both Statute and Treaty, although by the Treaty the Executive is granted a discretionary power to refuse extradition in the case of American citizens.

This has been the holding of the English courts in a precisely similar case.

In *In Re Galwey*, [1896], 1 Q. B. 230, a British subject was held for extradition to Belgium. The Anglo-Belgian Treaty provided, in language considerably more emphatic than that of the Franco-American Treaty:

> *"In no case, nor on any consideration whatever,* shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."

The prisoner, relying upon this provision of the Treaty, sued out a writ of *habeas corpus,* contending (as the respondents do here) that the committing magistrate had no jurisdiction under the Treaty to make an order for his extradition.

The Court, however, held to the contrary. Lord Russell, C. J. (Wright and Kennedy, J J. concurring) said at p. 235:

> "What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

The Court accordingly held that under the language quoted it was within the discretion of the Executive whether or not to surrender a British subject, and that he was not entitled to exemption as a matter of law.

This decision, we submit, is directly applicable to the present situation. It will be remembered that in England, as here, there can be no claim of any general sovereign discretion or prerogative to extradite independently of treaty or statute, since it is settled law that the Crown cannot, in the absence of statutory authority, send a British subject outside the

realm for trial. *Halsbury's Laws of England,* (1910 ed.) Vol. 14, p. 404. Indeed, the act of sending any British subject outside the realm without authority of statute, under Section 11 of the Habeas Corpus Act of 1679 (31 Car. II, c. 2) renders all persons concerned guilty of a *praemunire,* the penalty for which is imprisonment for life, and which under the Habeas Corpus Act is incapable of being pardoned by the Crown. Cf. *R.* v. *Home Secretary: Ex parte O'Brien,* [1923], 2 K. B. 361.

The lawful authority for extradition in England is substantially identical with that in the United States. The authority of Parliament given by the Extradition Act of 1870 (33 and 34 Vict. c. 52) corresponds to our Revised Statutes 5270 (U. S. Code, Title 18, Section 651, *supra,* p. 7). The Extradition Act, like our Statute, by its terms comes into operation only where there is an applicable Treaty; and in both countries, therefore, extradition is predicated upon the combined effect of the Statute and Treaty, the language of the Treaty being in each case the decisive factor. In *In re Galwey, supra,* as already noted, the language of the Treaty before the Court that "In no case, *nor on any consideration whatever*" should the parties be bound to surrender their own subjects, was considerably stronger for the relator than the language of the Franco-American Treaty in the case at bar; yet the Queen's Bench Division found no difficulty in holding that this Treaty gave ample authority for the extradition of a British subject.

Lord Russell in his opinion pointed out the difference between (1) a treaty which provides that *"neither party shall be bound"* to surrender its own citizens, and (2) a treaty which provides that *"No citizen shall be surrendered",* citing *R.* v. *Wilson,* 3 Q. B. D. 42 (1877).

In *R.* v. *Wilson,* a British subject was held for extradition to Switzerland under a treaty which provided

> "that no subject of the United Kingdom *shall be delivered up* by the Government thereof to Switzerland."

It was accordingly held in that case, in view of the language of the Treaty, that there was no authority to extradite a British subject in any event, and that the Courts were bound to grant him a discharge on *habeas corpus*. The Court reached this conclusion with obvious reluctance, Cockburn C. J., characterizing the result as "a blot upon the law". Field, J., in his concurring opinion pointed out the difference between the language of the Swiss Treaty and the language of treaties which provided simply that *"neither party shall be bound"* (thus foreshadowing the later decision in *In re Galwey*), saying (3 Q. B. D. at p. 46):

> "Is there not in this very treaty an exception? It is not that one country *shall not be bound* to deliver up, but that no subject *shall be delivered up* to the other country."

The effect of *In re Galwey* and *R.* v. *Wilson* is thus summarized in *Piggott on Extradition* (1910), the standard English textbook on the subject, at page 66:

> "The surrender of subjects was considered in *In re Galwey*, in the case of a fugitive about to be surrendered to Belgium. In the original treaty with that country subjects were excluded from its provisions. But in 1887, a new treaty was concluded, in which the following clause was inserted:
>
> > In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization.
>
> The point was taken, probably on account of the somewhat superfluous words in the article, that a British subject was not liable to be surrendered at all. The Court held that as neither country was bound to surrender its subjects, they might be surrendered, and that this was a question for the Secretary of State with which the Courts had nothing to do. Lord Russell intimated in his opinion that the Secretary of State might exercise his discretion at any stage, even after he had given his

> preliminary, or presumably his final order. The decision in *R.* v. *Wilson* was approved, where possible variations in language had already been pointed out by Field, J.: 'It is not [in the treaty with Switzerland] that one country shall not be bound to deliver up, but that no subject shall be delivered up".

Apart from the majority opinion of the Circuit Court of Appeals in the present case, the only judicial decision on either side of the Atlantic opposed to our position is that of the District Court for the Western District of Texas in *Ex parte McCabe,* 46 Fed. 363 (1891).*

In that case the Court (Maxey, J.) was called upon to interpret the Mexican Extradition Treaty of 1861, the relevant language of which was identical with that of Article V of the Franco-American Treaty above quoted. An American citizen (a woman) was charged with murder committed in Mexico. Upon being arrested and held for an extradition hearing, she immediately sued out a writ of *habeas corpus,* claiming that as an American citizen she could not lawfully be surrendered to the Mexican authorities.

The District Court sustained the writ and directed her discharge. After holding (46 Fed. at pp. 368-9) that the committing magistrate had no jurisdiction to act since there had been no complaint *on oath* as required by statute (a ground sufficient in itself to dispose of the case), the Court went on to consider the interpretation of the Treaty and the claim of American citizenship. After pointing out (quite correctly) that in the absence of treaty or statutory authority there was

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* The only other American decision on the point of which we are aware is a recent unreported case in the United States District Court for the Eastern District of Wisconsin (Geiger, J.). *In Re Drossner,* Dec. 7, 1935. In that case, the relator, an American citizen, was committed by a United States Commissioner, after hearings, for extradition to France under the same treaty as is here involved. On habeas corpus, he contended that he was exempt from extradition, because of his American citizenship, using the same arguments as those advanced by the respondents here. The Court, after argument and briefs, rejected his claim and dismissed the writ. No opinion was written. Our information is furnished by counsel who represented the French Government in that case.

no obligation to extradite fugitives, the Court concluded that the words "neither of the contracting parties shall be *bound* to deliver up its own citizens" meant that neither contracting party should be *permitted* to do so, that the Executive consequently had no discretion to permit the surrender of an American citizen in any case, and that Mrs. McCabe was therefore entitled to discharge as a matter of right.

The Court appears to have been of the opinion that because the Mexican Treaty stated that neither party "shall be bound" to extradite its own citizens, therefore no authority for such extradition was granted by the Treaty. This is clearly a *non sequitur*. The Treaty itself (and this is equally applicable to the Franco-American Treaty now before us) furnishes the authority for extradition when it says (Franco-American Treaty, Article I) that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other."

Under every extradition treaty, supplemented by the enabling statute, there are four distinct elements necessary for every extradition:

1. There must be a treaty with the foreign state from which the accused is a fugitive.

2. The accused must be charged with one of the crimes provided for in that treaty.

3. A judge or magistrate must, after full hearing, determine that there is evidence sufficient to sustain the charge, and certify his findings and evidence to the Secretary of State.

4. The Secretary of State may thereupon (and not before) surrender the accused to the foreign government.

It is to be noted that under the Statute the final word on extradition is in every case with the Executive. Even after the magistrate has decided that there is evidence sufficient to warrant extradition, the Secretary of State may nevertheless refuse to surrender the culprit.

17 Opinions of the Attorney-General, 184;
In re Palmer, Fed. Cas. No. 10,679.

Where the Treaty obligation is unqualified (as it would be for example, in the case of a French citizen fleeing from France to the United States) the Secretary's refusal to surrender might constitute a breach of the Treaty, entitling the foreign Government to make diplomatic remonstrances or even to declare the Treaty at an end; but this would be the responsibility of the State Department and not of the judiciary. The present Treaty, by providing that neither party *"shall be bound"* to extradite its own citizens, means simply that the Executive may do so or not in its discretion, and that a refusal to extradite an American citizen cannot be taken as a breach of the Treaty obligations. France cannot complain that the Treaty has been broken if the Executive refuses to surrender an American citizen who has committed an extraditable offense. The citizen cannot complain that his rights have been infringed if the Executive consents to surrender him after the magistrate has certified that there is probable cause for believing him guilty. The matter is for the diplomatic discretion of the Executive.

The function of the committing magistrate, as distinguished from the Executive, is simply to determine (1) whether the offense charged is within the Treaty, and (2) whether there is probable cause sufficient to warrant the committal of the accused for trial. *Charlton* v. *Kelly,* 229 U. S. 447, 459-68; *Collins* v. *Loisel,* 259 U. S. 309, 314-15. It then becomes the duty of the Secretary in his discretion to decide whether extradition will be granted, notwithstanding the citizenship of the accused.

This, as already noted, has been the precise holding of the English courts upon this issue, as well as of the District Court and the dissenting Judge of the Circuit Court of Appeals in the case at bar.

II. The construction for which respondents contend is repugnant to justice and contrary to accepted principles governing the interpretation of treaties.

It is an accepted principle that treaties are to be construed in a broad and liberal sense, and that that construction is to be preferred which is the most liberal in its scope and the most likely to promote the ends of substantial justice. In *Factor* v. *Laubenheimer,* 290 U. S. 276, this Court said at page 293:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Geofroy* v. *Riggs,* 133 U. S. 258, 271; *In re Ross,* 140 U. S. 453, 475; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437; *Asakura* v. *Seattle,* 265 U. S. 332."

And at page 298:

> "Other considerations peculiarly applicable to treaties for extradition, and to these treaties in particular, fortify this conclusion. The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as

> criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 More, Extradition, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. *Grin* v. *Shine*, 187 U. S. 181, 184; *Yordi* v. *Nolte*, 215 U. S. 227, 230."

The construction for which respondents contend is clearly narrow and restricted and is in fundamental conflict with the purpose of the Treaty, expressed in its preamble, that the parties are "desirous to promote the cause of justice."

Respondents, of necessity, must go to the extent of saying that any American citizen is free to commit in France all the crimes on the calendar, and that if he once succeeds in escaping to the United States, no power on earth can punish him, and he can enjoy in security the fruits of his crime. No Court in this country can punish him for an offense committed abroad; and upon respondents' contention, there is no power in either the Judiciary or the Executive to surrender him to the country from which he has fled. The shocking injustice of such a result is only too apparent.

The majority of the Circuit Court of Appeals recognized this when they said in their opinion (R. 36):

> "It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty."

But this is not all. The application of the present argument extends far beyond the single treaty which is now before this Court. The United States now has in force *no less than thirty-two other extradition treaties, all of which contain provisions which are word for word identical with Article V of the French Treaty with respect to the extradition of citizens.**

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*See list and analysis of these treaties, *infra*, Appendix A, page 42.

If respondents, and the majority of the Circuit Court of Appeals in the instant case, are correct in their reasoning, then American citizens in every one of these countries may commit all manner of crimes with the same immunity as is now claimed by the respondents in respect of crimes committed in France.

To this we can only answer in the words of this Court (*Neely* v. *Henkel*, 180 U. S. 109, 123):

> "We are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the county whose laws he has violated and from whose justice he has fled."

III. Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend.

The argument of respondents below, and the majority opinion of the Circuit Court of Appeals, both proceeded upon the theory that the history and background of the Franco-American Treaty of 1909 compelled the conclusion that Article V was intended to operate as a mandatory exemption of citizens, to the exclusion of all discretion or authority in either the courts or the Executive. This argument we believe to be unsound.

Let us examine first the history of the Treaty.

The only previous treaty with France on the subject of extradition was that of 1843 (8 Stat. 580; Malloy's Treaties, Vol. I, p. 526). This treaty was wholly silent on the subject of citizens and contained an unqualified obligation to surrender all *persons*. A conflict of opinion arose, of the type apparently inevitable between countries following the civil law (where jurisdiction over crime is personal as well as territorial) and countries following the common law (where

jurisdiction over crime, with rare exceptions, is territorial only). Civil law countries generally claim the right to try their own citizens for crimes committed abroad, and on this ground are generally unwilling to extradite them. Common law countries, on the other hand, claim no jurisdiction to try their own citizens for crimes committed abroad, with the result that unless extradition is granted the crime remains unpunished. The existence of this perennial conflict is well illustrated by the arguments and diplomatic correspondence set forth in the report of *Charlton* v. *Kelly*, 229 U. S. 447. *Cf. American Journal of International Law*, 1935 Supplement, page 123 (dealing with the proposed Draft Convention on Extradition).

Under the prior Franco-American Treaty, therefore, the United States was in a position to claim (according to its interpretation of such treaties, as subsequently sanctioned by this Court in *Charlton* v. *Kelly*) that France was bound to surrender her own citizens to us. France on the other hand had regularly refused to do so, pointing out that they could be punished at home.

In this posture of affairs the present Treaty was executed, containing in Article V a provision with respect to citizens which had been absent from the former treaty. The respondents argue, and the Circuit Court of Appeals apparently held, that the purpose of this insertion must of necessity have been to operate as a complete surrender of the position of the United States in favor of the traditional civil law attitude, and to exempt the citizens of both parties unconditionally and absolutely from all extradition. This amounts to saying that by the change in the treaty the United States deliberately and intentionally adopted a policy (not possible under the former treaty) of granting unconditional asylum, and immunity from all punishment, to any of its citizens who might succeed in making their escape from France after committing crimes abroad.

The shocking results of such an argument are plain, and there are the strongest practical reasons why such results should not be reached through process of speculation, in the

absence of the most compelling proof. Obviously neither party, in drafting the treaty, had any idea, or any desire, that its effect would be to render one party impotent to punish crimes committed on its own territory, or to make the territory of the other a safe haven for returning native-born criminals. On the contrary, a much more reasonable assumption is that the parties desired to avoid the embarrassment which had resulted from France's refusal to surrender her own subjects under the earlier treaty, and at the same time to prevent the miscarriages of justice which would result if citizens were held absolutely exempt from extradition. With this end in view, the treaty was revised to provide that extradition on both sides should be henceforth discretionary and not mandatory.

This view finds strong support in the legislative history of the treaty.

The Franco-American Treaty was signed on January 6, 1909. Only a few months before, in October, 1908, an amendment had been signed to the extradition treaty between France and Great Britain, covering the extradition of citizens in the following language:

> "Each of the High Contracting Parties shall be at liberty to refuse (sera libre de refuser) to the other the extradition of its own nationals." (Hertslet's Commercial Treaties, Vol. XXV, p. 336, Art. 2).

Prior to that time the Franco-British Treaty had contained a flat prohibition upon the extradition of citizens, which had led to the same unfortunate results as those presented in *R.* v. *Wilson, supra.* (Treaty of August 14, 1876, Art. 2, Hertslet, Vol. XIV, pp. 359, 360); *cf. Oppenheim on International Law,* 4th ed. (1928), Vol. I, page 569).

The amendment to the British Treaty and the new American Treaty were laid before both Houses of the French Parliament at the same time in the spring of 1909. Each was accompanied, under French parliamentary practice, by an "exposé des motifs", which is in the nature of an official introductory statement by the Government for the informa-

tion of the House. In the exposé des motifs accompanying the American Treaty it was said:

> "Article V gives to the two contracting parties the right not to deliver (le droit de ne pas livrer) their nationals. This general principle, which is part of our public law, did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391.

In the exposé des motifs accompanying the British Treaty it was stated clearly that the modification was made, not only to permit France to be free to refuse extradition of its own citizens, but also to prevent crime from going unpunished, by giving to the British Government the right to extradite British subjects. The exposé ends by saying that the new language will—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself; and thus crimes committed on our territory will no longer be liable to remain unpunished." Documents Parlementaires (1909), Sénat, Annexe 2338.

From the foregoing it is apparent that it was never the intention of France, at any rate, by language such as that contained in Article V of the present Franco-American Treaty, to *prohibit* extradition of citizens under all circumstances. On the contrary, it clearly appears to have been the understanding of France, at the time the treaty was executed, that such a clause rendered extradition in such cases discretionary.* The revision of the British and American treaties, carried out at the same time, illustrate the working of this fundamental principle under converse sets of circumstances. The British Treaty had forbidden extradition of citizens in every case. It was revised to *permit* such extra-

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* French textwriters uniformly hold the same view. (*infra*, p. 33).

dition, by language which stated simply that either party "shall be free to refuse." The earlier American Treaty had provided (according to the American interpretation at least) for an unqualified obligation to extradite citizens in all cases. It was revised to make this discretionary, by the use of the words "neither party shall be bound." In both cases the change in language was designed to reach the same result,—i. e. to make extradition of citizens possible at the discretion of the asylum state.

Viewed in this light, the Treaty of 1909 between France and the United States, and the almost contemporaneous amendment of the Treaty between France and Great Britain, represent a perfectly reasonable compromise between two conflicting views of criminal jurisdiction;* and the French legislative history shows that this was precisely what the parties intended.

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* At the time the Treaty of 1909 was negotiated, while it appears to have been the general practice of the French executive authorities to decline to extradite French subjects, the French law contained no prohibition upon such extradition. On the contrary, there was until 1927 express statutory authority for it, under the Decrees of Napoleon I of October 23, 1811, December 20, 1812, and February 25, 1813. See Bernard, *Traité Theorique et Pratique de l'Extradition*, (2nd ed. 1890) Vol. II, p. 106 *et seq.*; Bonafos, *de l'Extradition*, 103.

The first statutory prohibition upon the extradition of French subjects is found in Article 3 of the French Law of Extradition of March 10, 1927; but under Article 1 of the same Law, it is provided that the statute is to apply only in the absence of a treaty, so that even this statute does not necessarily prohibit extradition of French citizens under the Franco-American Treaty. Cf. Travers, *"L'Entraide Repressive Internationale et la Loi Française du 10 Mars 1927"*, (1928) pp. 169 & 170.

The status of the French domestic law as it existed at the time of the Treaty is in any event immaterial, in view of the decision of this Court in *Charlton* v. *Kelly*, *supra*. In that case there was involved the Italian Treaty of 1868. It was shown that it had been the invariable practice of Italy since long prior to 1868 to refuse the extradition of Italian subjects in every case. It was also shown that the Italian Government itself, in cases arising under the treaty between 1868 and 1890, had taken the position that Italian "common law" absolutely forbade the extradition of Italian citizens. This "common law" was codified and reaffirmed in the Italian Penal Code of 1890. Nevertheless, this Court sustained the practice of surrendering American citizens to Italy, notwithstanding the fact that Italy, in the face of its treaty obligations, uniformly refused to reciprocate.

The necessity for some such compromise will continue so long as civil law countries insist that their judges should have the exclusive right to punish their own citizens for crimes committed anywhere on the face of the earth, while common law countries insist, with equal force, that their juries cannot punish anyone for crimes committed outside the limits of the vicinage. The existence of Executive discretion renders the Treaty workable and furthers the administration of justice for which it was designed. If the United States has no discretion or power to surrender its citizens, then a complete miscarriage of justice results, since no American court can try them. If, on the other hand, a discretion exists—which is all we contend for,—such miscarriages can be prevented.

If it be objected that this construction may not in practice result in strict reciprocity, or that it would derogate from the dignity of the United States to surrender its citizens unless assured in advance that civil-law countries would always agree to surrender theirs in return, three answers may be made:

First, as was pointed out by Secretary Knox, and as was held by this Court in *Charlton* v. *Kelly*, there is no requirement that extradition treaties should be reciprocal. Secretary Knox in that case said—and his language was quoted with approval by this Court in its opinion (229 U. S. at p. 476):

> "Therefore, *since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens*, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

Second, even Great Britain (a nation which has always been zealous in the protection of her citizens' rights against foreign powers) has entered into extradition treaties which by their terms *bind her unequivocally and in all cases to sur-*

*render British subjects without reciprocity**—a far more drastic doctrine than any which we now urge.

Third, the question whether the surrender of American citizens is proper, so long as civil-law countries continue unwilling to surrender their citizens in return, is in any event a question for the Executive, and not for the Courts, and it cannot possibly arise in this case. We urge, not that the United States *must* extradite its own citizens in every case, but simply that it *may* do so. It the Executive should feel unwilling to extradite these respondents (after a magistrate has passed on the evidence of their guilt) because France may be unwilling to extradite Frenchmen to us, the Executive may decline to make the surrender. All we urge is that the hands of the Executive and of the courts should not be tied in advance, and that the Secretary should retain that discretionary power which the treaty gives him, and which we believe its framers intended.

IV. The claim of "Practical Construction" of the Treaty in favor of respondents is unfounded.

The District Court in *Ex parte McCabe, supra,* and the majority of the Circuit Court of Appeals in the case at bar (R. 32-34), placed great reliance upon the fact that in four instances (set forth in the opinion in *Ex parte McCabe,* 46 Fed. at 378-9), the State Department is claimed to have construed the language of our former treaty with Mexico as prohibiting the extradition of citizens of either country.

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* Halsbury's Laws of England (1910 Ed.) Vol. 14, p. 406, note (s), cites the treaties with Luxemburg, Spain and Switzerland as falling within this class. Article I of the Treaty with Luxemburg of 1880 (Hertslet's Commercial Treaties, Vol. XV, p. 234) provides that Great Britain agrees to deliver up "all persons" charged with specified crimes, while Luxemburg agrees to deliver up "all persons, excepting subjects of the Grand Duchy". Article I of the Treaty with Switzerland (Hertslet, Vol. XV, p. 384) and Article I of the Treaty with Spain (Hertslet, Vol. XIV, p. 519) contain similar language.

Even if it be assumed that the rulings claimed to have been made by the State Department some forty years ago in the case of the Mexican treaty would be applied by the State Department at the present day to the French treaty now before this Court, the fact remains that the construction of a treaty is in the last analysis for the judiciary, and that "practical construction" by the Executive, while entitled to respectful consideration, is in no sense conclusive. This is well illustrated by the decision of this Court in *United States* v. *Rauscher,* 119 U. S. 407, 415-16. In that case the question was whether a fugitive criminal extradited to the United States for one offense could be tried on his arrival for a different one. The State Department (see 119 U. S., at p. 415) had construed the treaty there involved as authorizing trial of the accused for a different offense from that for which he had been extradited. Arguments in support of this construction were advanced at the bar by the Solicitor General. The British Foreign Office, on the other hand, had adopted the opposite view. This Court rejected the construction of the State Department and adopted that of Great Britain.

Furthermore, upon careful analysis it will be found that the instances relied upon in *Ex parte McCabe* and in the Circuit Court of Appeals wholly fail to establish the claim of "practical construction", even in the case of the Mexican treaty.

The former Mexican treaty, under which *Ex parte McCabe* was decided, was signed in 1861. (12 Stat. 1199, Malloy's Treaties, Vol. 1, p. 1127). Article 6 contained language with respect to the extradition of citizens identical with that of Article V of the present French treaty.

The first case involving the application of this provision in the Mexican treaty appears to have arisen in 1871, when the United States requested the Mexican Government to extradite certain Mexican citizens who had escaped to the State of Sonora, after committing murder and robbery in Arizona.

The fact that the United States requested such extradition furnishes an indication that at that date at least our Government entertained no idea that the treaty prevented such extradition. The Mexican Government of the day, however, appears to have entertained different views, and declined extradition. The case is reported in *Foreign Relations, 1871,* pages 628-30, and in *Moore on Extradition,* Vol. 1, page 164.

The problem was again presented in 1874, when one Francisco Perez, a Mexican, murdered an American citizen in Texas and escaped into Mexico. This is the first of the four cases cited in *Ex parte McCabe,* and in the opinion of the Circuit Court of Appeals below, as sustaining the present claim of respondents. The Circuit Court of Appeals says, in dealing with the *Perez* case:

> "Secretary Fish refused to request the Mexican authorities to surrender him, and although his reasons are apparently not now accessible, the ruling itself was inconsistent with the belief that the clause reserved to both parties a discretionary power of surrender. If it did, it certainly was his duty to ask for the exercise of that discretion." (R. 33.)

This language of the Circuit Court of Appeals is not borne out by the facts. What actually happened in the *Perez* case was thus stated by Secretary Frelinghuysen, in a report to the Senate contained in Senate Executive Document 98, 48th Congress, First Session, ser. 2166, reprinted in Wharton's Digest of International Law (2nd ed., 1887) vol. 2, section 268, at page 752:

> "In 1874 Francisco Perez, a Mexican, murdered Joseph Alexander, an American, residing at Brownsville, Tex., and escaped into Mexico. It was the purpose of this Government to have Perez sent back for trial on this side the frontier, and the instruction from Mr. Fish to Mr. Foster states that though this, under the treaty, could not be expected as a matter of right, and would not be asked as a matter of favor or even accepted as such with any understanding that it would be reciprocated

by us, still Mr. Foster was authorized to apply to the Mexican Government, making known all the circumstances, and submitting whether they were not such as to warrant a voluntary surrender of the party, if this could in any case be done. October 3, 1874, Mr. Foster reported that the Mexican Government declined to surrender Perez, and Mr. Fish, in acknowledging this dispatch, remarked that it was not surprising that the Mexican Government so acted, especially as it had a technical right to refuse the request."

It will be noted from the above that far from refusing to request extradition, Secretary Fish actually directed that such a request should be made, coupling it, however, with the express explanation that the surrender, if granted, would be a voluntary or discretionary act of the Mexican Government.

The next reported case arising under this section was in 1877, when two Mexicans, Dominguez and Barrera, fled to Mexico after committing a murder in Texas. The United States duly requested their extradition; and they were arrested by the Mexican authorities and held for surrender. They thereupon applied to the Mexican courts for an "amparo", the equivalent of our writ of *habeas corpus*. The court of first instance sustained their claim and directed their discharge, upon the ground that as Mexican ctizens they were exempt from extradition. On appeal, however, the Supreme Court of Mexico, by a vote of nine to five, reversed the court of first instance and held that they were subject to extradition. While the decision appears to have been based in part at least upon the fact that the Mexican citizenship of the accused was not conclusively established, the opinion of Chief Justice Vallarta contains strong *dicta* to the effect that the language of the treaty does not forbid extradition of citizens, but makes such extradition discretionary with the Executive—a view which he had himself put into operation as foreign secretary of Mexico the year before. This case is reported in *Moore on Extradition*, vol. 1, pages 165-6, and

in *Foreign Relations, 1878,* pages 560-567, including (at p. 562) a complete translation of the opinion of Chief Justice Vallarta. (Another translation of portions of the same opinion appears in the dissenting opinion of Judge Manton in the case at bar (R. 44)).

Again in 1878, the Mexican Government, on request of the United States, while expressly reciting that its act was done as a matter of discretion, ordered the surrender of certain Mexicans who had participated in an assault on the jail in Rio Grande City, Texas. Before the execution of the order, the Governor of Texas made its issuance the basis of a demand for the surrender of other Mexicans *as a matter of right*; and the Mexican Government thereupon withdrew the order. *Moore on Extradition,* vol. 1, pages 164-5. *Foreign Relations, 1878,* pages 539-40. The action of the Mexican Government in this case was entirely consistent with the position that the extradition of citizens could be granted as a matter of discretion, but not as a matter of right.

In 1884 arose the case of Alexander Trimble, an American citizen whose extradition was demanded by Mexico. This is the second of the four cases relied upon in *Ex parte McCabe,* and in the Circuit Court of Appeals below, to sustain the claim of "practical construction" according to the respondents' views. Again, an examination of the facts discloses that no such construction was in fact made.

The case is covered in detail in a report made by Secretary Frelinghuysen to the Senate on February 13, 1884 (Senate Executive Document 98, 48th Congress, first session, ser. 2166, quoted in full in *Wharton's Digest of International Law,* (2nd ed., 1887) vol. 2, section 268, pages 749-754.) In dealing with this case the Circuit Court of Appeals said (R. 33):

> "Secretary Frelinghuysen refused to deliver him up upon demand by Mexico, following the precedent of 1874."

In fact the Secretary did nothing of the sort. What happened was this: On receiving by telegraph a request for Trimble's extradition, Secretary Frelinghuysen replied that under the language of the treaty an American citizen could not be surrendered. Subsequently, and after giving further consideration to the matter, the Secretary decided that his first conclusion might have been wrong, and that the matter was doubtful and should be tested in the courts. He accordingly sent a second telegram to the United States Marshal in Texas directing that Trimble be held in custody pending further consideration; but in the meanwhile Trimble had already been released, and apparently was never recaptured.

In response to a Senate resolution, Secretary Frelinghuysen submitted a lengthy report on the entire affair. After a discussion of various authorities, his report concludes as follows (*Wharton's Digest of International Law,* (2nd ed., 1887) vol. 2, section 268, page 753):

> "* * * I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.
>
> 'Such being the construction of the treaty, and believing that the time to prevent a violation of the law of extradition was before the citizens left the jurisdiction of the United States, I telegraphed the governor of Texas that an American citizen could not legally be held under the treaty for extradition.
>
> 'It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power.
>
> *'On further reflection,* in view of the fact that fourteen of our treaties with other nations contain provisions identical with that contained in our treaty with Mexico, and impressed also with the fact that the safety and peace of society on the frontier would be greatly injured if criminals, because citizens of this country, could here find an asylum and go unpunished, *I concluded that the question was one of too much importance to be settled by the dictum of any individual, but should receive judicial*

determination, and to this end I telegraphed the officers to hold the accused until they received other direction. The accused had, however, after my first telegram, been discharged.

'*I now propose to inform the officers in Texas*, who, subject to the supervision of the President, are authorized to determine whether a surrender of the accused should be made, *that if another arrest is made and a case of guilt is made out the President will not, on the ground of citizenship, interfere with an order of surrender if such be made, but requires that the accused be informed that if he or they wish a hearing before the Supreme Court of the United States on habeas corpus as to the power of the President in the matter of extradition, or as to the true construction of the treaty before the surrender be actually made, every facility for such hearing will be afforded.* Should the court hold that the President has discretionary power of extraditing citizens proven guilty of crime, the evil apprehended will not be realized, and should the court hold that the President has the power to extradite only when bound by treaty to do so, Congress can then, if it should be its pleasure, by statute confer the discretionary power."

From this it will be seen that while Secretary Frelinghuysen appears to have been personally of the opinion that the treaty forbade the extradition of citizens, he nevertheless entertained grave doubts as to the correctness of his own views, and was unwillin, to let the matter rest on his decision, but expressly directed that the matter be brought before the courts. It also appears that he was fully alive to the unfortunate results which would follow if it should be held that no power existed to make the extradition; and he apparently hoped that the courts would declare that the power existed. This is certainly very far from constituting a definite administrative construction in any sense.

In 1888 Secretary Bayard, apparently misapprehending the views of his predecessor, or forgetting his predecessor's desire to have the question tested in the courts, refused to

surrender an American citizen, one Hudson, on a charge of robbery. No reasons were given for the decision other than the mere citation of the *Trimble* case, contained in a letter to the Governor of Texas, quoted in *Ex parte McCabe,* at page 378. The same ruling was again made in 1891, shortly before the decision of the *McCabe* case, and again was supported merely by a citation of the *Trimble* case. See letter of Secretary Blaine quoted in *Ex parte McCabe,* at page 379.

Summary of the above.

It will thus be seen that down to the time of the decision in *Ex parte McCabe* nothing remotely approaching a uniform course of "practical construction", favorable to the respondents, had been adopted by either the Government of Mexico or the Government of the United States under the Mexican treaty. On the contrary, we find the Government of the United States, in at least four instances, requesting the surrender by Mexico of Mexican citizens—an act which is consistent only with the theory that such surrender was a matter of discretion under the treaty. We find the Mexican Executive in at least two cases recognizing that the surrender of its own citizens could properly be made under the Treaty as a matter of discretion; and we find the Supreme Court of Mexico sustaining this interpretation. As regards the converse case of the surrender of American citizens, the only considered opinion was that of Secretary Frelinghuysen, in *Trimble's* case, in which the Secretary stated in substance that, while he *thought* he had no power to surrender American citizens, the question was doubtful, and was one upon which an independent judicial decision should be had.

In this state of affairs came the decision in *Ex parte McCabe*; and the embarrassment resulting from this decision, and from the conflicting views of the parties, appears to have been such that in 1899, when a new extradition treaty was negotiated with Mexico, the disputed article was changed to

read as follows (Art. IV of Mexican Treaty of 1899, 31 Stat. 1818, Malloy's Treaties, Vol. 1, p. 1184):

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, *but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.*" (Art. IV.)

Substantially similar language is found in six other extradition treaties.*

Upon this alteration of the Mexican Treaty the majority of the Circuit Court of Appeals in the present case bases a further argument, which in effect is this: At the time the Franco-American Treaty was negotiated in 1909, the parties had before them the precedent of the Mexican amendment of 1899, which contained an express grant of discretion; and their failure to incorporate the same express grant in the Franco-American Treaty compels the conclusion that they intended deliberately to exclude discretion.

We submit, however, that the insertion of express words stating that the parties *may* surrender their own citizens although they are not *bound* to do so adds nothing to the force of the Treaty, and that these words have been inserted on occasion simply from an abundance of caution on the part of the draftsman.† The Anglo-Belgian Treaty which was before the Court in *In re Galwey, supra,* contained no such provision. Its language on its face stated unequivocally and without qualification that neither party *"shall be bound"* to

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*Japan, 1886; Argentina, 1896; Orange Free State, 1896; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905 (See *infra*, Appendix A, p. 41).

†As stated in the dissenting opinion in the present case, the reason for the amendment of the Mexican Treaty in 1899

> "was merely to clear up doubts cast upon the plain meaning of the provisions of Article VI of the 1861 Convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the McCabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 convention. It adds nothing, because where the country *is not bound* but *may* surrender, discretion is necessarily implied." (R. 45).

extradite its own citizens. Yet the Queen's Bench Division had no difficulty in holding that these words implied the existence of a discretionary power. Mr. Justice Field in *R.* v. *Wilson, supra,* was of the same opinion.

When the parties met to negotiate the Franco-American Treaty of 1909, they had before them, as already noted, a prior treaty under which the United States was unequivocally bound to surrender its citizens to France. No cases had arisen, similar to those arising with respect to Mexico, of American citizens committing crimes in France and returning to remain unpunished in the United States. There is nothing to indicate that either the rulings of the State Department some twenty years earlier on the Mexican Treaty, or the decision of Judge Maxey in *Ex parte McCabe,* were present in the mind of either party at the time the French Treaty was negotiated.

The Attitude of the State Department at the Present Time.

At pp. 23-29 *supra* we have discussed the instances relied upon by the respondents, and by the Court below, as establishing a "practical construction" favorable to their views. All of these instances occurred with respect to the former Mexican Treaty prior to the decision in *Ex parte McCabe* in 1891. After 1891, it appears to have been the attitude of the State Department that the decision in *Ex parte McCabe* constituted a binding judicial interpretation, which the Department was compelled to follow; and there seems to have been no further reported decision by the State Department upon the issue. At the present date, in view of the conflict of judicial authority, the attitude of the Department appears to be one of neutrality; and it is apparently the Department's position that the question is an open one upon which an authoritative judgment of the courts should be had. This at least would seem to be indicated by the following letter setting forth the views of the State Department with respect to the case at bar, written prior to the argument in the Circuit Court of Appeals:

Address Official Communications to
THE SECRETARY OF STATE
WASHINGTON, D. C.

No. 1079417
from
Department of Justice
In reply refer to
Le 211.51 Neidecker, B. Coles/28

DEPARTMENT OF STATE
WASHINGTON

December 11, 1935

My dear Mr. Attorney General:

I have received your letter dated December 10, 1935, (File: JBK 95-100-124) and its enclosure concerning the case pending in the United States Circuit Court of Appeals for the Second Circuit arising out of the requisition of the French Government for the extradition to France of B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker.

In the event the Circuit Court of Appeals requests the United States District Attorney for the Southern District of New York for an expression of this Department's views regarding the case, I should be glad if you would direct him to state to the Court (1) that this Department recognizes that the interpretation of treaties pertains to the judicial as well as to the executive branches of the Government; and (2) that in view of the apparent conflict between the decision of the United States District Court for the Southern District of New York in the Neidecker case and the decision of the United States District Court in Texas, ex parte McCabe, 46 Fed. 363, this Department would find it helpful to have a decision by an appellate court on the question of the interpretation of Article V of the Treaty of Extradition concluded on January 16, 1909, between the United States and France.

Sincerely yours,

For the Secretary of State,
R. Walton Moore
Assistant Secretary

The Honorable
Homer S. Cummings
Attorney General

Le: FMD:RUL:SS
12/11

V. The Franco-American Treaty, and other treaties containing similar language, have regularly been interpreted by textwriters as conferring a discretion on the Executive.

Textwriters on international law have classified extradition treaties under three heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state (such as our present Treaty with Great Britain, and the Treaty with Italy which was before this Court in *Charlton* v. *Kelly*, 229 U. S. 447),

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered" (such as the Anglo-Swiss Treaty which was before the Court in *R.* v. *Wilson, supra*);

3. Those which give to the asylum state a discretion to surrender its own citizens or not, as the Executive may decide in each case.

The Franco-American Extradition Treaty now before the Court, and other treaties containing similar language, are regularly classified by modern authorities under the third of these categories, along with treaties which, like the Mexican treaty above quoted, contain express words of discretion. *Oppenheim on International Law* (4th Ed. 1928), Vol. I, page 569:

> "Although Great Britain is ready to extradite one of her own subjects for crimes committe abroad, she is, in some cases prevented from doing so because the extradition treaties concerned comprise a clause stipulating that nationals 'should not' be extradited. Thus the extradition of Alfred Thomas Wilson, who had committed theft in Zurich in 1877, and whose surrender was claimed by Switzerland, had to be refused, because the Anglo-Swiss Treaty of 1874 comprised such a clause (see *Reg.* v. *Wilson* (1877) 3 Q.B.D. 42). To avoid such a deplorable result subsequent extradition treaties be-

tween Great Britain and foreign states usually comprise a clause according to which no party is compelled to extradite nationals. It is thus left to the discretion of the parties whether they will extradite one of their own subjects or not. As late as 1906 the extradition of a British subject had to be refused to France because Article 2 of the Anglo-French Treaty of 1896 precluded the surrender of nationals. However, by a Convention of 1908 (Treaty Series (1909) No. 34) Article 2 of the Treaty of 1896 has been remodelled."

Saint Aubin—L'Extradition et le Droit Extraditionnel (1913) Vol. 1, p. 309, dealing with the amendment to the Treaty just mentioned by Oppenheim, *supra*, says:

"Following this new provision of the law concerning the situation of nationals with respect to extradition between France and England, we may cite the Article of the Franco-American Treaty of January 6, 1909, which deals with the same point. It will be noted that although the idea is identical the expressions in this Article are different:

'Neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention.'

It is again the asylum state which has the sovereign discretion to decide whether or not the demand should be granted when it concerns one of its own subjects. We thus reach the practical application of the resolution of the Congress of Oxford and Brussels, which had regarded it as equally dangerous to exclude systematically from the treaties the extradition of citizens and to decide that they should always be extradited."

Travers—Droit Pénal International (1922) Vol. V, pages 28-31, 32:

"Considered from the point of view of the extradition of nationals, the treaties adopted by France are divided into four different types:

1. Some adopt purely and simply the principle that the character of a national of the state excludes any possibility of extradition;

2. Others stipulate that this character renders extradition entirely discretionary;

* * * * * * * * *

*The second group of treaties signed by France includes those which have been signed with * * *; the United States of January 6, 1909, Article V:*

'Neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.' "

VI. A comparison of the discretionary language of Article V of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument.

We may further distinguish the discretionary language that a party "shall not be bound" to surrender its own citizens with the language regularly used in other phases of extradition treaties when it is intended that a particular subject should be completely excluded from the operation of the treaty and no opportunity left for discretion.

In nearly all extradition treaties there is found in the same document the discretionary provision that neither party *"shall be bound"* to extradite its own citizens and also the mandatory provision that extradition *"shall not be granted"* in specified cases, such as those involving political offenses, offenses barred by the Statute of Limitations, offenses committed prior to the Treaty, etc. Thus in the Franco-American Treaty of 1909, now before the Court, we find:

Art. V—Neither party *"shall be bound"* to extradite its own citizens.

Art. VI—Fugitive criminals *"shall not be surrendered"* for political offenses.

Art. VIII—Extradition *"shall not be granted"* where prosecution is barred by the Statute of Limitations of the asylum state.

The contrast between the mandatory and discretionary language of the two types is clearly apparent.

In some cases, in fact, the contrast is pointed out in a single article. Thus Article III of the Treaty with Peru of 1870 (18 Stat. 719, Malloy's Treaties, Vol. 2, p. 1428) provides in a single paragraph:

> "The provisions of the present treaty *shall not be applied* in any manner to any crime or offense of a purely political character, nor shall the provisions of the present treaty *be applied* in any manner to the crimes enumerated in the second article committed anterior to the date of the exchange of the ratification hereof. Neither of the contracting parties *shall be bound* to deliver up its own citizens under the stipulations of this treaty."

In nearly every extradition treaty ever concluded by the United States, the same contrast is present. Thus in Article III of the Treaty with Brazil of 1897 (33 Stat. 2091; Malloy's Treaties, Vol. 1, p. 148) it is provided:

> "Extradition *shall not be granted* if the offense on which the surrender is demanded be of a political character."

Article V of the same Treaty provides:

> "The contracting parties *shall in no case be obliged* to surrender their own citizens in virtue of the stipulations of the present treaty."

And Article VIII of the same Treaty provides that extradition *"shall be refused"* where prosecution is barred by the Statute of Limitations of the asylum state.

In Appendix A (*infra*, p. 40) we have examined and tabulated the text of every extradition treaty made by the

United States from 1789 to date. This examination serves to confirm in a striking way the distinctions above outlined. It serves also to point out the appalling results which would follow from a holding that American citizens cannot be extradited under treaties having language similar to that of the Franco-American Treaty of 1909. Such treaties are now in force, containing this identical language, with a large majority of countries of the civilized globe. If the respondents' contention be correct, in every one of those countries an American citizen can commit any crime, no matter how heinous, and if he once succeeds in taking refuge in the United States, no power on earth can punish him for his offense.

VII. There is no distinction between the case at bar and the decision of the Queen's Bench Division in *In re Galwey*.

Upon its face the decision of the Queen's Bench Division in *In re Galwey* is clearly an authority for our contentions. The majority of the Circuit Court of Appeals, however, refused to follow it upon the ground that the circumstances under which that decision was rendered were different from those here involved. We quote from the majority opinion as follows (R. 34).

> "A ruling of an English court (in Re Galway, (1896) 1 Q.B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. R. v. Wilson, 3 Q.B. 42. In that year it was amended and what we have called the Prussian clause [i.e.—a clause similar to that contained in the Franco-American Treaty] was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant

for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred."

Obviously the amendment to the Anglo-Belgian Treaty in the *Galwey* case had to be given some meaning. It is equally obvious that the language of the new Franco-American Treaty here must be given some meaning, and that the parties intended to make *some* change from the earlier language of the 1843 treaty. But there is no authority whatever for assuming that the change which the parties intended was that which the Circuit Court of Appeals has held—i.e. a change from an absolute obligation to surrender citizens in every case to an absolute prohibition against surrendering them at all.

If that had been the intention of the parties, they could easily have expressed it by incorporating in the 1909 treaty a clause such as that which had been presented in *R.* v. *Wilson, supra,* to the effect that:

"No citizen of either party *shall be surrendered.*"

Or they could have followed the precedent of Art. XXIV of the treaty between the United States and the Two Sicilies of 1855* (the only American treaty of the kind), which provided that:

"The citizens and subjects of each of the high contracting parties *shall remain exempt* from the stipulations of the preceding articles."

Or they could have copied, in Article V of the Franco-American treaty, the mandatory wording used in Articles VI and VIII of the very same treaty, which clearly exclude all discretion with respect to extradition for political offenses and those barred by the statute of limitations (*supra,* pp. 35-6).

But the parties did nothing of the kind. Instead they adopted language which, on its face, certainly shows no in-

* 11 Stat. 639, 653; Malloy's Treaties, Vol. 2, p. 1814, 1822.

tention to confer an absolute exemption. Not only is there no authority for saying that any such intention existed; but on the contrary, as pointed out above (*supra*, pp. 18-21), it is far more reasonable to assume that the new language represented a compromise between the views of the two parties, and that the change was from an absolute and unqualified obligation to surrender citizens in all cases to a qualified or discretionary obligation to do so or not, as the Executive might deem fit.

CONCLUSION.

We submit that there is no sound authority for declaring, as a matter of law, that the Executive has no power in any case to surrender an American citizen under treaties containing such language as that herein involved. On the contrary, such treaties should be interpreted, as they have been by the French Government, by textwriters, by the dissenting opinion below, and by the English courts, as rendering extradition discretionary with the political department of the Government, subject always to the prior requirement of a hearing before the magistrate, and the production of evidence sufficient to convince him that there is probable cause for believing the accused guilty. It will then be the duty of the State Department to decide whether or not in its discretion surrender should take place; and there is no warrant for declaring in advance that this discretion does not exist.

It is accordingly respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed and the respondents remanded for the purpose of extradition hearings according to law.

September 10, 1936.

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APPENDIX A.

In this Appendix are tabulated the various provisions of all extradition treaties ever made by the United States (inducing both those now in force and those which have been superseded or terminated) in which language is used, whether discretionary or mandatory, to exclude particular persons or subjects. This tabulation supports the distinction made at pages 35-37 of this brief between the discretionary language habitually used to deal with the extradition of citizens, and the mandatory language used when it is desired to exclude all discretion.

1. Provisions dealing with extradition of citizens of the asylum state.

Extradition treaties on this subject may be classified under four heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state.

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"—leaving no opportunity for discretion.

3. Those which in express terms give to the asylum state a discretion to surrender its own citizens.

4. Those which, like the present Franco-American Treaty, provide simply that "neither party *shall be bound*" to surrender its own citizens—language which was interpreted by the English courts in *In re Gaiwey* and *R.* v. *Wilson* as meaning that the Executive, while not bound to surrender its own citizens, had discretion to do so.

The American treaties on the subject may be classified under these four heads as follows:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state.

Dominican Republic, 1867, (M 1, 403)*
Ecuador, 1872, (M 1, 436)
France, 1843, (M 1, 526)
Great Britain, 1794, Art. XXVII (M 1, 605)
" " 1842, Art. X (M 1, 655)
" " 1889, (M 1, 740)
" " 1931, (47 Stat. 2122)
Hawaiian Islands, 1849, Art. XIV (M 1, 913)
Italy, 1868, (M 1, 966)
Nicaragua, 1870, (M 2, 1287)
Orange Free State, 1871, (M 2, 1310)
Switzerland, 1850, (M 2, 1767-8)
Venezuela, 1860, (M 2, 1855)

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"—leaving no opportunity for discretion.

Only one instance of such a treaty has been found, this being Article XXIV of the Treaty of 1855 with the King of the Two Sicilies (M 2, 1822) which reads:

> "The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals."

3. Those which in express terms give to the asylum state a discretion to surrender its own citizens.

Seven such treaties have been found, as follows:

Argentina, 1896, Art. III (M 1, 26) reading as follows:

> "In no case shall the nationality of the person accused be an impediment to his extradition, under the conditions stipulated by the present treaty, but neither Gov-

* References to M 1, M 2 or M 3 are to Volumes 1, 2 and 3 of Malloy's Edition of the Treaties of the United States.

ernment shall be bound to deliver its own citizens for extradition under this Convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

Orange Free State, 1896, Art. V (M 2, 1316) is identical with the foregoing.

Guatemala, 1903, Art. V (M 1, 881) reading as follows:

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

Mexico, 1899, Art. IV (M 1, 1186) and Nicaragua, 1905, Art. V (M 2, 1295) are identical with the foregoing.

Japan, 1886, Art. VII (M 1, 1027) reading as follows:

"Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up, if in their discretion it be deemed proper to do so."

Uruguay, 1905, Art. X (M 2, 1828) reading as follows:

"The obligation to grant extradition shall not in any case extend to the citizens of the two parties, but the executive authority of each shall have power to deliver them up if, in its discretion, it is deemed proper to do so."

4. Those which, like the present Franco-American Treaty, provide simply that "neither party shall be bound" to surrender its own citizens—language which was interpreted by the English courts in In re Galwey and R. v. Wilson as meaning that the Executive, while not bound to surrender its own citizens, had discretion to do so.

This is much the largest class of treaties, there being forty-eight of this kind all told, of which some thirty-two are in

force today. The commonest phrasing is identical with that of the Franco-American Treaty and provides that neither party *"shall be bound"* to extradite its own citizens. This language appears in the following treaties:

Albania, 1933, Art. VIII (Treaty Series, No. 902)
Austria, 1930, Art. VIII (46 Stat. 2784)
Austria-Hungary, 1856, Art. II (M 1, 37)
Baden, 1857, Art. II (M 1, 52)
Bavaria, 1853, Art. III (M 1, 59)
Belgium, 1874, Art. IV (M 1, 89)
" 1882, Art. V (M 1, 102)
" 1901, Art. V (M 1, 108)
Bolivia, 1900, Art. V (M 1, 127)
Bulgaria, 1924, Art. VIII (43 Stat. 1889)
Chile, 1900, Art. V (M 1, 194)
Colombia, 1888, Art. X (M 1, 325)
Costa Rica, 1922, Art. VIII (M 3, 2551)
Cuba, 1904, Art. V (M 1, 369)
Denmark, 1902, Art. V (M 1, 393)
Dominican Republic, 1909, Art. VIII (M 3, 2570)
Esthonia, 1923, Art. VIII (43 Stat. 1852)
Finland, 1924, Art. VIII (44 Stat. 2004)
France, 1909, Art. V (M 3, 2582)
Germany, 1930, Art. II (47 Stat. 1863)
Greece, 1931, Art. VIII (47 Stat. 2191)
Hanover, 1855, Art. III (M 1, 897)
Honduras, 1909, Art. VIII (M 3, 1688)
Iraq, 1934, Art. VIII (Treaty Series, No. 907)
Latvia, 1923, Art. VIII (43 Stat. 1741)
Lithuania, 1924, Art. VIII (43 Stat. 1838)
Luxemburg, 1883, Art. V (M 1, 1055)
Mexico, 1861, Art. VI (M 1, 1127)
Netherlands, 1880, Art. VIII (M 2, 1263)
" 1887, Art. VIII (M 2, 1269)
Norway, 1893, Art. V (M 2, 1303)
Ottoman Empire, 1874, Art. VII (M 2, 1343)
Panama, 1904, Art. V (M 2, 1359)
Paraguay, 1913, Art. VIII (M 3, 2786)
Peru, 1870, Art. III (M 2, 1428)
" 1899, Art. V (M 2, 1447)
Poland, 1927, Art. VIII (46 Stat. 2287)
Portugal, 1908, Art. VIII (M 2, 1472)
Prussia, 1852, Art. III (M 2, 1503)
Rumania, 1924, Art. VIII (44 Stat. 2025)

Salvador, 1911, Art. VIII (M 3, 2823)
Servia, 1901, Art. V (M 2, 1624)
Siam, 1922, Art. VIII (43 Stat. 1752)
Spain, 1877, Art. VIII (M 2, 1667)
Spain, 1904, Art. VIII (M 2, 1715)
Sweden, 1893, Art. V (M 2, 1738)
Sweden and Norway, 1860, Art. IV (M 2, 1757)
Venezuela, 1922, Art. VIII (M 3, 2873)

In five of the foregoing treaties (all concluded with Germanic states in the 1850's) there is a reference in the preamble to the effect that the contracting party other than the United States is not permitted by its own laws to extradite its own citizens. Thus in the preamble of the Treaty with Austria-Hungary of 1856, *supra*, occurs the language:

> "Whereas the laws of Austria forbid the surrender of its own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any *obligation* to surrender citizens of the United States * * *."

Substantially similar language appears in the preambles of the following treaties among those listed *supra*:

Baden, 1857
Bavaria, 1853
Hanover, 1855
Prussia, 1852

In a few treaties there are minor variants of the language to the effect that neither party "shall be bound" to surrender its own citizens. In each case, however, the meaning of the language is the same. These variants are as follows:

(a) "The contracting parties *shall in no case be obliged* to surrender their own citizens."
Brazil, 1897, Art. V (M 1, 149)

(b) "The contracting parties *shall not be required* to deliver up their own citizens."
Russia, 1887, Art. IV (M 2, 1529)

(c) "In no case and for no motive shall the High Contracting Parties *be obliged to deliver up* their own subjects."
Salvador, 1870, Art. V (M 2, 1549)

It is to be noted that the language of the Treaty with Salvador, just quoted, while more emphatic than that of the others, is still no more emphatic than the language of the Anglo-Belgian Treaty before the Court in *In re Galwey*, where the phrase was nevertheless held to imply the existence of discretion.

2. Provisions dealing with political offenses.

Provisions excluding political offenses from the purview of extradition treaties are quite common. In every instance, in marked contrast to the language dealing with the extradition of citizens, the phraseology employed is mandatory and emphatic. Several varying forms of language, all to the same effect, are employed:

(a) "Extradition *will not be granted*" for political offenses.
Argentina, 1896, Art. VI (M 1, 27)
Brazil, 1897, Art. III (M 1, 148)
Switzerland, 1900, Art. VII (M 2, 1773)

The Argentine Treaty, *supra*, further provides on this subject of political offenses:

"In cases of doubt with relation to the present article, the decision of the judicial authorities of the country to which the demand for extradition is directed will be final."

The Swiss Treaty, *supra*, provides:

"If the question arises in a particular case, whether the offense committed is or is not of a political character, the Authorities of the State upon which the demand is made shall decide."

(b) The provisions of the Treaty *"shall not apply"* or *"shall not be applied"* or *"shall not be applicable"* to political offenses.

Belgium, 1874, Art. III (M 1, 89)
" 1882, Art. IV (M 1, 102)
" 1901, Art. IV (M 1, 108)
Dominican Republic, 1867, Art. XXX (M 1, 413)
France, 1843, Art. V (M 1, 527)
Guatemala, 1903, Art. IV (M 1, 881)
Hayti, 1864 Art. XLI (M 1, 932)
Italy, 1868, Art. III (M 1, 967)
Mexico, 1861, Art. VI (M 1, 1127)
Netherlands, 1880, Art. III (M 2, 1263)
" 1887, Art. III (M 2, 1268)
Nicaragua, 1870, Art. III (M 2, 1288)
" 1905, Art. IV (M 2, 1295)
Orange Free State, 1871, Art. XII (M 2, 1313)
Ottoman Empire, 1874, Art. III (M 2, 1342)
Peru, 1870, Art. III (M 2, 1428)
Salvador, 1870, Art. III (M 2, 1549)
Sweden and Norway, 1860, Art. V (M 2, 1757)
Switzerland, 1850, Art. XVII (M 2, 1768)
Two Sicilies, 1855, Art. XXIV (M 2, 1822)
Venezuela, 1860, Art. XXX (M 2, 1855)

(c) *"Surrender shall not take place"* if it appear that extradition is sought for a political offense.

Japan 1886, Art IV (M 1, 1027)
Russia, 1887, Art. III (M. 2, 1528)

(d) *"Extradition shall not take place"* for political offenses.

Mexico, 1899, Art. III (M 1, 1186)

(e) Fugitive criminals *"shall not be surrendered"* for political offenses.

Bolivia, 1900 Art. VI (M 1, 127)
Chile, 1900, Art. VI (M 1, 194)
Cuba, 1904, Art. VI (M 1, 369)
Denmark, 1902, Art. VI (M 1, 393)
France, 1909, Art. VI (M 3, 2583)
Great Britain, 1889, Art. II (M 1, 741)
" " 1931, Art. VI (47 Stat. 2124)
Norway, 1893, Art. VI (M 2, 1303)

Orange Free State, 1896, Art. VI (M 2, 1316)
Panama, 1904, Art. VI (M 2, 1359)
Peru, 1899, Art. VI (M 2, 1447)
Servia, 1901, Art. VI (M 2, 1625)
Sweden, 1893, Art. VI (M 2, 1738)

In all of the foregoing group of treaties except that of 1931 with Great Britain, it is provided that:

"If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government on which the demand for surrender is made" shall be final.

(f) "The provisions of this Convention (or Treaty) shall not import a claim of extradition for any crime or offense of a political character."

Albania, 1933, Art. III (Treaty Series, No. 902)
Austria, 1930, Art. III (46 Stat. 2783)
Bulgaria, 1924, Art. III (43 Stat. 1888)
Costa Rica, 1922, Art. III (M 3, 2551)
Dominican Republic, 1909, Art. III (M 2, 2569)
Esthonia, 1923, Art. III (43 Stat. 1851)
Finland, 1924, Art. III (44 Stat. 2003)
Germany, 1930, Art. IV (47 Stat. 1867)
Greece, 1931, Art. III (47 Stat. 2189)
Honduras, 1909, Art. III (M 3, 2687)
Iraq, 1934, Art. III (Treaty Series, No. 907)
Latvia, 1923, Art. III (43 Stat. 1740)
Lithuania, 1924, Art. III (43 Stat. 1837)
Paraguay, 1913 Art. III (M 3, 2785)
Poland, 1927, Art. III (46 Stat. 2286)
Portugal, 1908, Art. III (M. 2, 1472)
Rumania, 1924, Art. III (44 Stat. 2024)
Salvador, 1911, Art. III (M 3, 2822)
Siam, 1922, Art. III (43 Stat. 1751)
Spain, 1877, Art. III (M 2, 1666)
" 1904, Art. III (M 2, 1714)
Venezuela, 1922, Art. III (M 3, 2872)

(g) "Political crimes and misdemeanors are expressly excepted from the present treaty."

Uruguay, 1905, Art. III (M 2, 1826)

3. Provisions excluding extradition where the offense is barred by the Statute of Limitations.

It is frequently provided in extradition treaties that surrender shall not be had where the offense is barred by the Statute of Limitations—reference usually being made to the Statute of Limitations of the asylum states although in a few cases reference is made to the Statute of Limitations of the demanding state as well. The language is mandatory in all cases save one. A number of forms are used:

(a) Extradition *"will not be granted"* or *"shall not be granted"* where the offense is barred by the Statute of Limitations.

Argentina, 1896, Art. VII (M 1, 27)
Belgium, 1882, Art. IX (M 1, 103)
" 1901, Art. IX (M 1, 109)
Bolivia, 1900, Art. VII (M 1, 128)
Chile, 1900, Art. VII (M 1, 194)
Cuba, 1904, Art. VII (M 1, 369)
Denmark, 1902, Art. VII (M 1, 393)
France, 1909, Art. VIII (M 3, 2583)
Guatemala, 1903, Art. VIII (M 1, 881)
Honduras, 1909, Art. V (M 3, 2687)
Luxemburg, 1883, Art. IX (M 1, 1056)
Nicaragua, 1905, Art. VIII (M 2, 1296)
Norway, 1893, Art. VII (M 2, 1303)
Orange Free State, 1896, Art. VII (M 2, 1316)
Panama, 1904, Art. VII (M 2, 1359)
Peru, 1899, Art. VII (M 2, 1448)
Servia, 1901, Art. VII (M 2, 1624)
Sweden, 1893, Art. VII (M 2, 1738)
Switzerland, 1900, Art. VIII (M 2, 1773)

(b) Fugitives *"shall not be surrendered"* where the offense is barred by the Statute of Limitations.

Albania, 1933, Art. V (Treaty Series, No. 902)
Austria, 1930, Art. V (46 Stat. 2784)
Bulgaria, 1924, Art. V (43 Stat. 1888)
Costa Rica, 1922, Art. V (M 3, 2551)
Dominican Republic, 1909, Art. V (M 3, 2569)
Esthonia, 1923, Art. V (43 Stat. 1851)

Finland, 1924, Art. V (44 Stat. 2004)
Germany, 1930, Art. VI (47 Stat. 1867)
Greece, 1931, Art. V (47 Stat. 2190)
Iraq, 1934, Art. V (Treaty Series, No. 907)
Latvia, 1923, Art. V (43 Stat. 1740)
Lithuania, 1924, Art. V (43 Stat. 1837)
Netherlands, 1880, Art. V (M 2, 1263)
Netherlands, 1887 Art. V (M 2, 1268)
Paraguay, 1913, Art. V (M 3, 2785)
Poland, 1927, Art. V (46 Stat. 2286)
Portugal, 1908, Art. V (M 2, 1472)
Rumania, 1924, Art. V (44 Stat. 2024)
Salvador, 1911, Art. V (M 3, 2823)
Siam, 1922, Art. V (43 Stat. 1751)
Spain, 1877, Art. V (M 2, 1667)
Venezuela, 1922, Art. V (M 3, 2873)

(c) Extradition *"shall be refused"* where the offense is barred by the Statute of Limitations.
Brazil, 1897, Art. VIII (M 1, 149)

(d) Extradition *"shall not take place"* where the offense is barred by the Statute of Limitations.
Mexico, 1899, Art. III (M 1, 1186)
Great Britain, 1931, Art. V (47 Stat. 2124)

(e) The only exception to the rule that statute-barred offenders are exempted by mandatory language is Uruguay, 1905, Art. VII, which provides that "extradition *may be refused*" in such cases. (M 2, 1828).

4. Provisions excluding extradition for offenses committed prior to the treaty.

Here again in all of the treaties where such a provision occurs the language is mandatory:

(a) The provisions of this Treaty *"shall not apply"* or *"shall not be applied"* in respect of offenses committed prior to the Treaty.
Belgium, 1874, Art. III (M 1, 89)
Dominican Republic, 1867, Art. XXX (M 1, 413)
France, 1843, Art. V (M 1, 527)
Great Britain, 1889, Art. VIII (M 1, 742)

Hayti, 1864, Art. XLI (M 1, 932)
Mexico, 1861 Art. VI (M 1, 1127)
Orange Free State, 1871, Art. XII (M 2, 1313)
Peru, 1870, Art. III (M 2, 1428)
Switzerland, 1850, Art. XVII (M 2, 1768)
Two Sicilies, 1855, Art. XXIV (M 2, 1822)
Venezuela, 1860, Art. XXX (M 2, 1855)

(b) *"Surrender shall not be demanded"* for offenses committed prior to the Treaty.
Russia, 1887, Art. III (M 2, 1528)

(c) *"No person shall be subject to extradition"* for offenses committed prior to the Treaty.
Spain, 1877, Art. IV (M 2, 1667)

5. Provisions dealing with the death penalty.

A few countries, whose own laws forbid the imposition of the death penalty, have exacted a provision that extradition shall not be granted to the United States where the offense is punishable in the United States with death.

Thus the Treaty of 1908 with Portugal (M 2, 1469) in its text contains no mention of exception for the death penalty. Portugal however, insisted upon provision being made for this; and accordingly the United States Senate in ratifying the Treaty stated that:

> "* * * it is agreed by the United States that no person charged with crime *shall be extraditable from Portugal* upon whom the death penalty can be inflicted for the offense charged by the laws of the jurisdiction in which the charge is pending."

The same procedure was followed in respect of the Treaty of 1922 with Costa Rica (43 Stat. 1629).

In Article IV of the Treaty of 1922 with Venezuela (M 3, 2872) it is provided:

> "In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to

decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted."